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THE
AMERICAN LAW REGISTER.

NOVEMBER 1879.

CITIZENSHIP BY NATURALIZATION.

(Concluded from October No., p. 612.)

III.

THE legislation under which admission to citizenship in the United States formerly took place was the 3d paragraph of the 1st section of the Act of April 14th 1802, which declared, "That the court admitting such alien shall be satisfied that he has resided within the United States five years at least:" (2 U. S. Stat. at Large 153.) This act was subsequently modified by the 12th sect. of the Act of 3d of March 1813 (2 U. S. Stat. at Large 811), which reads, "That no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission, as aforesaid, have resided within the United States, without being at any time during the said five years out of the territory of the United States." But this last act was itself changed by the Act of 26th June 1848 (9 U. S. Stat. at Large 240), which declares, "That the last clause of the 12th section of the act" (that is to say, the section just above quoted), "hereby amended, consisting of the following words, to wit, 'Without being at any time during the said five years out of the territory of the United States,' be and the same is hereby repealed." These amendments left the law to

require that the applicant should be a resident of the United States for five years next preceding his admission to citizenship, but at the same time declared that uninterrupted habitation was not necessary: for a man may be, and frequently is, an inhabitant of one place while he is a resident of another; which is the case with all who leave a residence, with whatever view of duty, business or pleasure, but with the design of returning to it.

In the case of *Campbell v. Gordon*, 6 Cranch U. S. S. C. Rep. 182, the Supreme Court of the United States said: "The oath, when taken, confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights. It is therefore the unanimous opinion of the court that William Currie was duly naturalized."

In the case of *Spratt v. Spratt*, 4 Peters U. S. S. C. 407, the Supreme Court of the United States said, speaking of naturalization: "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity." The court, in giving judgment admitting an alien to citizenship, judges both the law and the fact, and its judgment is conclusive on both these questions.

It was the opinion of an American jurist¹ (2 Kent 45), expressed forty years ago, that the doctrine of final and absolute expatriation required "to be defined with precision, and to be subjected to certain established limitations, before it can be admitted into our jurisprudence as a safe and practicable principle, or laid down broadly as a wise and salutary rule of national policy." English legislation for a long period declared that the quality of citizen, as the result of birth, follows the individual during his whole life, and the legislation of the United States inclined to this view; but a recent statute¹ contains provisions which enable, for the first time, a British subject to renounce allegiance to the crown, and also to resume his British nationality. The American doctrine on this subject for many years remained unsettled, owing to the fact that the legislation of Congress was in conflict with the doctrine of the United States

¹ 33 Vict. ch. xiv. An Act to amend the law relating to the legal conditions of aliens and British subjects, May 12th 1870.

courts, and this inconsistency which appeared in the naturalization laws was pointed out at an early date by an American editor (2 Kent 49, note). There have indeed been statesmen and cabinet officers who have denied *in toto* the doctrine of perpetual allegiance, and who would appear to have gone to the extent of holding that it was a maxim of American constitutional policy, as it was of ancient Rome, not to allow her citizenship to be shared with any other state. (Despatch of secretary of state to the United States minister at Berlin, in the case of *Hoyer; Christian Ernst's Case*, 9 Opin. Att. Gen. 351.) And the United States government, in the absence of treaty or convention, has of late years gone to the extent of giving protection to naturalized citizens who have returned to their native country, against every new obligation or duty imposed by the laws after the act of naturalization. (Calvo, *Derecho Internacional*, vol. 1, p. 288, *et seq.* *Case of Liano*, heretofore referred to, *ante* 601.¹) The Act of Congress of July 27th 1868, § 1 (15 Stat. at Large 223, 224), after reciting that the right of expatriation is a natural and inherent right of all people, &c., enacts that any declaration, instruction, opinion, order, or decision of any officer of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government. Under the erroneous impression that this act contained a provision, "that whenever it shall be duly made known to the president that any citizen of the United States has been arrested and is detained by any foreign government, in contravention of the intent and purposes of this act, upon the allegation that naturalization in the United States does not operate to dissolve his allegiance to his native sovereign, or if any citizen shall have been arrested and detained whose release upon demand shall have been unreasonably delayed or refused, the president shall be, and hereby is, empowered to suspend in part or wholly commercial relations with the said government, or, in case no other remedy is available, order the arrest, and to detain in custody *any subject or citizen of the said foreign government* who may be found within the jurisdiction of the United States, except ambassadors and other public ministers, and their domestics and domestic servants, and who has not declared his intention to become a

¹ Papers relating to the Foreign Relations of the United States, 43d Congress, 1st Session, Ex. Doc. 1, part 1, p. 1303.

citizen of the United States ; and the president, shall, without delay, give information to Congress of any such proceedings under this act :" Phillipmore said : "This strange reprisal, after the fashion of the First Napoleon, of seizing and imprisoning innocent foreign subjects, is novel in modern public law. It would be equivalent to a declaration of war against the state to which the subject belonged. No state has a right to dissolve the relations of native allegiance between a foreign subject and his state without that state's consent." (Commentaries on International Law, 2d ed. 1871, vol. 1, p. 385, note.) Legislation of this character would have been in violation of universal principles of justice, and would have been obnoxious to sharp criticism ; but the learned author has fallen into error as to the law of the United States in this particular. No such law as that set forth in the text was ever enacted by the Congress of the United States. It is true, however, that the third section of the original act concerning the rights of American citizens in foreign states, which was passed by the House of Representatives, was to the effect and in the language criticised by Phillipmore ; but this whole section was stricken out by the Senate, which substituted the third section of the Act of Congress, of July 27th 1868 ; the amendment of the Senate was concurred in by the House, and the act as amended became the law. Congressional Globe, Washington, D. C., 1867, 1868, 2d Sess. 40th Congress, pt. 5, pp. 4445, 4451 ; 15 U. S. Stat. at Large 223, 224 ; U. S. Revised Statutes, sect. 2001, p. 352.¹

Since the passage of the Act of July 27th 1868, the United States, as heretofore indicated, has entered into treaty stipulations with nearly all the nations of Europe, by which the contracting powers mutually concede to subjects and citizens the right of expatriation, *on conditions and under qualification*. And if there shall arise conflict between the above Act of Congress and any treaty in this matter, it would seem that the treaty must be held to be of higher dignity and paramount ; for the treaty is a contract between nation and nation in derogation of international law, and any case arising under treaty or convention would be subject to construction of public law, as varied or modified by treaty stipulations.

In the matter of residence, as a preliminary qualification for nat-

¹ Since this article was written, the writer has been advised by the author quoted that the error, which elicited this criticism, will be corrected in a forthcoming edition.

uralization, many nations have recently entered into treaty stipulations, by the terms of which the contracting powers have agreed to make an uninterrupted residence of five years in the adopted country a necessary qualification for admission to citizenship.¹ These treaties contain a provision providing for the punishment in case of return to the native country of a naturalized citizen or subject for offences committed against the country of adoption before emigration; and a provision for renunciation of citizenship by naturalization, on the return of the individual to the country of birth, and a residence of two years. Under these treaties the consideration what shall constitute "uninterrupted residence" within the meaning of the clause remains; and questions of difficulty and embarrassment will doubtless continue to arise on the construction of this clause. And, as between the contracting parties to a treaty containing a stipulation in these or similar terms, the objection is that, on this point of residence, it may be open, to the nation whose convenience in the particular case it suits, to deny the conclusiveness, as evidence of nationality, of a letter or certificate of naturalization. We have already seen that in practice the nations generally, in the absence of treaties, concede this character to a letter or certificate of naturalization regularly issued under municipal law.

By the terms of the treaty of naturalization between the United States of America and Great Britain, May 13th 1870, provision is made for the naturalization in either country of the subjects or citizens of the other, as well as for the renunciation of such acquired citizenship in such manner as shall be agreed upon by the governments of the respective countries. And the act heretofore referred to (33 Vict. c. 14), contains provisions from which it appears that Parliament has acted upon and adopted the substantial recommendations contained in the report of Her Majesty's commissioners. The first conclusion at which these commissioners arrived was: "That

¹ Austria and the United States, September 20th 1870; Grand Duchy of Baden and the United States, July 19th 1868; Bavaria and the United States, May 26th 1868; Belgium and the United States, November 16th 1868; Grand Duchy of Hesse and the United States, August 1st 1868; Mexico and the United States, July 10th 1868; North German Union and the United States, February 22d 1868; Sweden and Norway and the United States, May 26th 1869; Wurtenburg and the United States, July 27th 1868; Denmark and the United States, July 20th 1872; Ecuador and the United States, June 28th 1872. See Treaties and Conventions between the United States and other Powers since July 4th 1776. Washington Government Printing Office, 1871.

under a sound system of international law such a thing as a double nationality should not be suffered to exist." *Nationality*, London, 1869, p. 214.

It is the merit of the modern process of naturalization of aliens now under discussion, that the letter or certificate of naturalization constitutes such authentic proof of the nature and character of this intention as may not be questioned or denied. And generally acts of naturalization, by which is meant the admission to citizenship of aliens, are made matter of public record in the country of adoption. But as the country of origin is not regarded in this matter, unless by concession made under treaty, no provision is made for advising or acquainting the country of origin of the transfer of allegiance of her subject or citizen. From this omission, complications and embarrassments in the relations between nations have not infrequently arisen; the recurrence of which might be, to a great extent at least, guarded against.

As a method of acquiring citizenship, naturalization—imperfect and subject to some abuse as it still may be in certain quarters and countries—has the peculiar merit that it is made matter of public record, at least in the country of adoption. The learned chief justice, heretofore quoted, suggests that if nationality should become as it ought, matter of international concern, it would be highly expedient that an arrangement should be made for communicating the names of persons naturalized, or electing between two nationalities, to the agents of the states concerned, to be by them transmitted to their governments, so that no dispute as to the fact could afterwards arise.

Of the five years uninterrupted residence clause in the treaty between the United States and Prussia, on behalf of the North German Confederation, of the 22d February 1868, Lord Chief Justice COCKBURN says: "This treaty is ambiguous, and open to difficulty on two points. 1st. It is left uncertain whether the five years' residence required by the first article is to run from the time of the naturalization, or whether prior residence will be available to satisfy the condition; 2d. It is left in doubt whether on naturalized subjects quitting the country of adoption *sine animo revertendi*, and returning to their native country and thereby losing the citizenship of the former, the original nationality would revert."

Some controversy has lately arisen between the United States and the North German Confederation, over the case of Baumer, a native of Prussia, who had been naturalized in the United States,

and thereafter returned to Prussia; and the matter has been brought to the attention of Congress through joint resolutions providing for the termination of the naturalization treaty of 22d February 1868, between the United States and the North German Confederation. House of Rep., 45th Congress, 3d sess. bill 202 and 104. The official correspondence has not yet been published, but it is suggested in official circles that this case is a fair specimen of many arising in Germany, and which frequently embarrass the foreign relations of this country. In commenting upon this treaty soon after its conclusion, it was said (Calvo, *Derecho Internacional*, Paris, vol. 1, p. 288 *et seq.* note) : "This treaty gives a satisfactory solution to the question presented by Lincoln, in his message of the 8th December 1863. In this message attention was called to the fact that foreigners had frequently been naturalized in the United States for the purpose of escaping obedience to the laws of their native country, to which, as soon as naturalized, they would return, claiming for all time the protection of the government of the United States. To prevent this abuse he declared it was necessary to fix some period, on the expiration of which foreigners who had been naturalized in the United States, and had returned to their native country, may not claim the protection of the republic."

IV.

In his last message to Congress (December 5th 1876), President Grant, referring to naturalization and expatriation, said : "I suggest no additional requirements to the acquisition of citizenship beyond those now existing, but I invite the earnest attention of Congress to the necessity and wisdom of some provisions regarding uniformity in the records and certificates, and providing against the frauds which frequently take place, and for the vacating of a record of naturalization obtained in fraud. These provisions are needed in aid and for the protection of the honest citizen of foreign birth, and for the want of which he is made to suffer not infrequently. The United States has insisted upon the right of expatriation, and has obtained after a long struggle an admission of the principles contended for by acquiescence therein on the part of many foreign powers and by the conclusion of treaties on that subject. It is, however, but justice to the government to which such naturalized citizens have formerly owed allegiance, as well as to the United States, that certain fixed and definite rules should be adopted

governing such cases and providing how expatriation may be accomplished. While emigrants in large numbers become citizens of the United States, it is also true that persons both native [born] and naturalized, once citizens of the United States, either by formal acts, or as the effect of a series of facts and circumstances, abandon their citizenship and cease to be entitled to the protection of the United States, but continue on convenient occasions to assert a claim to protection in the absence of provisions on these questions. * * * The delicate and complicated questions continually occurring with reference to naturalization, expatriation and the status of such persons as I have above referred to, induce me to earnestly direct your attention again to these subjects."

In a former message (December 7th 1875), the President called attention to the fact that "fraud being discovered, however, there is no practicable means within the control of the government by which the record of naturalization can be vacated, and should the certificate be taken up, as it usually is, by the diplomatic and consular representatives of the government to whom it may have been presented, there is nothing to prevent the person claiming to have been naturalized from obtaining a new certificate from the court in place of that which has been taken from him."

The want of a proper remedy and means for the vacating of any record fraudulently made, with a provision in the law for punishing the guilty parties to the transaction was, and is, *casus omissus*. And it was under this view of the existing law that the President urged action by Congress. Attention was also called to the necessity of legislation concerning the marriages of American citizens, contracted abroad, and concerning the status of American women who may marry foreigners, and of children born of American parents in a foreign country.

The original naturalization laws only extended to free "white" persons. But when Congress was engaged in framing the law of July 14th 1870, Senator SUMNER moved to strike out the word "white." Senator WILLIAMS then proposed to insert at the end of the section: "But this act shall not be construed to authorize the naturalization of persons born in the Chinese Empire."

The following debate is then reported:

MORTON. "This amendment involves the whole Chinese problem. Are you prepared to settle it to-night?"

STEWART. "Without discussion."

MORTON. "And without discussion? I am not prepared to do it."

SUMNER. "The senator says it opens the great Chinese question. It simply opens the question of the Declaration of Independence and whether we will be true to it. 'All men are created equal,' without distinction of color."

MCCREERY offered as an amendment to the amendment: "Provided, that the provisions of this act shall not apply to persons born in Asia, Africa or any of the islands of the Pacific, nor to Indians born in the wilderness."

WARNER offered as a substitute for the original amendment: "That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." This was concurred in; yeas 20, nays 17: section 7 of the Act of July 14th 1870. Such was the law on the statute book when the revisers of the United States Statutes prepared their revision, which, in the first draft, was formulated as follows: "The provisions of this title shall apply to aliens of African nativity and to persons of African descent:" sect. 2169.

In 1875, when this draft was before Congress for amendment, attention was called to the fact that as the law stood, it would authorize the naturalization of Asiatic immigrants, and the above section was amended by inserting, in the first line, after the word "aliens", the words "being free white persons, and to aliens," &c.: Act of February 18th 1875.

The decisions of SAWYER, J. (United States Circuit Court, California, April 29th 1878), in *Ah Yup's Case*, and of CHOATE, J. (United States Circuit Court, New York, July 1879) on *Charles Miller's Application*, rest upon the law as amended. The writer has been informed that Yung Wing, of the Chinese Embassy at Washington, and other natives and subjects of the Emperor had been previously naturalized.

The opinion of Akerman, Attorney-General of the United States in 1871, in the case of *Moses Stern* (Opinions of Attorneys-General, vol. 13, p. 376), is sometimes cited in denial of the proposition that the record of naturalization is conclusive upon all the world, and may not be impeached, except for fraud, or want of jurisdiction in the court making the record. It is not authority for any such position. This opinion was given in a case which turned upon the construction of the Treaty of 1868 between the United

States and the North German Confederation ; and the conclusion was doubtless greatly influenced and may have been justified, perhaps, by the circumstance that Stern, while in Prussia, never avowed himself an American, but, on the contrary, took a passport as a Prussian. When examined and tested in the light of international law, by the practice of nations, and under authoritative precedents, it will be found to stand alone. But Akerman adds : “ But recitations in the record of matters of fact are binding only upon parties to the proceedings and their privies. The government of the United States was no party, and stands in privity with no party to these proceedings. And it is not in the power of Mr. Stern by erroneous recitations in *ex parte* proceedings, to conclude the government as to matters of fact.” (*Sic.*) It will appear from this extract, that the Attorney-General, in this case, failed to recognise the fact that the certificate or record of naturalization is in the nature of a judgment *in rem* ; and that the proceeding to obtain it is invariably *ex parte*. And he seems to be oblivious of the fact that these records are made, or at least are supposed to be made, by the court ; and *not by the applicants for admission to citizenship.*

In *Levy's Case* (14 Opinions 509), Williams, Attorney-General, said that the proceeding to obtain naturalization was a judicial act, and that it has the force and effect of a judgment.

It follows, if the proposition laid down at the beginning of this article be correct, that in absence of treaty stipulations or concessions as to naturalization, the matter, in practice, is within the exclusive control of the power issuing the certificate or letter ; and the judgment of the tribunal or court, to whom the power to grant the same is confided by the supreme power in the state, is conclusive as to law and fact everywhere and upon all the world. *United States v. The Acorn*, 2 Abbott's U. S. Rep. 443; *The People, &c., v. McGown*, 77 Ill. 644, and cases cited.¹

It is an universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter ; and individual

¹ See opinion of BLATCHFORD, J., Circuit Court of the United States, for the southern District of New York, *In the matter of Peter Coleman*, on habeas corpus. Opinion of FREEDMAN, J., Superior Court of New York, in *Christern's Case*, 1879.

rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, *power in the officer, and fraud in the party.* All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive, legislative, judicial or special, unless an appeal is provided for, or other provision, by some appellate or supervisory tribunal, is prescribed by law: *United States v. Arredondo*, 6 Pet. (U. S.) 729-30, and cases cited.

When the inquiry is, "was there fraud?" it will be instructive to refer to the three rules laid down in *Conard v. Nicoll*, 4 Peters (U. S.) 295, and which were declared incontrovertible by the Supreme Court of the United States: *United States v. Arredondo, supra.*

When the inquiry is, "had the tribunal power or jurisdiction?" it will be instructive to consult Robinson (Rob. Practice, vol. 7, ch. 1, tit. 1).

In another case the U. S. Supreme court said: "The judgment of confirmation raises a presumption conclusive, while that judgment stands unreversed, that whatever was necessary to its legality was proved and found by the court, and it cannot be impeached collaterally: *Voorhees v. Bank of the United States*, 10 Pet. (U. S.) 193.

"The distinction," said LONGYEAR, J., announcing the decision in *The Acorn*, "between cases in which judgments may and those in which they may not be impeached collaterally, as derived from the authorities, and founded in common sense, may be stated thus: They may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court and passed upon."

It has been, from time to time, urged that the same effect should not be given to a certificate of naturalization as is given, generally, to the judgments, sentences or decrees of courts of record; and that naturalization proceedings, as usually conducted, are virtually *ex parte*. But the answer to these suggestions is that the proceeding to obtain naturalization, in the United States, at least, is

a judicial one; and it is before a court which exercises a peculiar jurisdiction. The proceeding is, as it is technically termed, *in rem*, and the general rule, as to the effect and conclusiveness of a judgment, sentence or decree thereupon pronounced, is familiar: Starke on Evidence *241-8.

A valuable and instructive discussion of the plea of *res judicata* as estoppel, and of the replication thereto, is found in Robinson's Practice, vol. 7, ch. 1, tit. 1, where the leading cases are compared, criticised and distinguished.

ALEXANDER PORTER MORSE.

Washington, D. C.

RECENT AMERICAN DECISIONS.

Circuit Court of the United States. District of California.

HO AH KOW *v.* MATTHEW NUNAN.

An ordinance of San Francisco, that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, should immediately upon his arrival at the jail, have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," and made it the duty of the sheriff to have this provision enforced, is invalid, being in excess of the authority of the municipal body, whether the measure be considered as an additional punishment to that imposed by the court upon conviction under a state law, or as a sanitary regulation, and constituted no justification to the sheriff acting under it.

The ordinance being directed against the Chinese only, imposing upon them a degrading and cruel punishment, is also subject to the further objection, that it is forbidden by that clause of the Fourteenth Amendment to the Constitution, which declares that no state "shall deny to any person within its jurisdiction the equal protection of the laws." This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments; and to the subordinate legislative bodies of its counties and cities.

The equality of protection thus assured to every one whilst within the United States, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice, he shall suffer for his offences no greater or different punishment.

THIS was an action brought to recover damages for alleged maltreatment by the defendant, sheriff of San Francisco. The maltreatment consisted in having cut off the queue of the plaintiff, a queue being worn by all Chinamen, and its deprivation being